

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

SEAN GILL, ROBERT SMITH, TIM	:	
RAMOS AND JACKIE RIVERA	:	
	:	
Plaintiff	:	
	:	
vs.	:	File No. 2022-C-1849
LEHIGH COUNTY BOARD OF ELECTIONS,	:	
PHILLIPS ARMSTRONG, JENNIFER	:	
ALLEN, DENNIS NEMES, TIMOTHY A.	:	
BENYO AND DIANE GORDIAN	:	
	:	
Defendant	:	

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LEHIGH COUNTY BAR ASSOCIATION
LAWYER REFERRAL SERVICE

P.O. BOX 1324

ALLENTOWN, PENNSYLVANIA 18105

TELEPHONE: 610-433-7094



Signature

Walter S. Zimolong, Esquire
(Name)

353 W. Lancaster Ave., Ste. 300, Wayne, PA 19087
(Address)

215-665-0842
(Telephone Number)

IN THE COURT OF COMMON PLEAS, LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

SEAN GILL
c/o 353 W. Lancaster Ave., Suite 300
Wayne, PA 19087

ROBERT SMITH
c/o 353 W. Lancaster Ave., Suite 300
Wayne, PA 19087

TIM RAMOS
353 W. Lancaster Ave., Suite 300
Wayne, PA 19087

and

JACKIE RIVERA
353 W. Lancaster Ave., Suite 300
Wayne, PA 19087.

Plaintiffs,

v.

LEHIGH COUNTY BOARD OF
ELECTIONS
Lehigh County Government Center
17 South Seventh Street
Allentown, PA 18101-2401

PHILLIPS ARMSTRONG
Lehigh County Government Center
17 South Seventh Street
Allentown, PA 18101-2401

JENNIFER ALLEN
Lehigh County Government Center
17 South Seventh Street
Allentown, PA 18101-2401

DENNIS NEMES
Lehigh County Government Center

NO. 2022-C-1849

17 South Seventh Street :
Allentown, PA 18101-2401 :
:
TIMOTHY A. BENYO :
Lehigh County Government Center :
17 South Seventh Street :
Allentown, PA 18101-2401 :
:
and :
:
DIANE GORDIAN :
Lehigh County Government Center :
17 South Seventh Street :
Allentown, PA 18101-2401, :
:
Defendants. :
:
_____ :

COMPLAINT IN EQUITY AND MANDAMUS

Plaintiffs file this complaint for a special and preliminary injunction and for a writ of mandamus and aver as follows:

Parties

1. Plaintiff, Sean Gill, is a resident of Allentown and a registered voter. Gill intends to vote in the upcoming November 8, 2022, general election.
2. Plaintiff, Robert Smith, is a resident of Allentown and a registered voter. Smith intends to vote in the upcoming November 8, 2022, general election.
3. Plaintiff, Tim Ramos, is a resident of Allentown and a registered voter. Ramos intends to vote in the upcoming November 8, 2022, general election.
4. Plaintiff, Jackie Rivera, is a resident of Allentown and a registered voter. Rivera intends to vote in the upcoming November 8, 2022, general election.

5. Defendant, Lehigh County Board of Elections is a county board of elections organized and existing under 25 P.S. § 2641. The Board is responsible for conducting primary and general elections in Lehigh County. Among other duties, the Board has a statutory duty to select and equip polling places, 25 P.S. § 2642(a), make rules, regulations, and instructions consistent with the Pennsylvania election code for the conducting of elections, 25 P.S. § 2642(f), to investigate fraud, irregularities, and violations of the election code and report the same to the District Attorney, 25 P.S. § 2642(i), and to receive, canvass, and compute ballots and to certify election results to the Secretary of the Commonwealth, 25 P.S. § 2642(k).

6. Defendant, Phillips Armstrong, is a member of the Lehigh County Board of Elections and is sued in his official capacity.

7. Defendant, Jennifer Allen, is a member of the Lehigh County Board of Elections and is sued in her official capacity.

8. Defendant, Dennis Nemes, is a member of the Lehigh County Board of Elections and is sued in his official capacity.

9. Defendant, Timothy A. Benyo, is the chief clerk of the Lehigh County Board of Elections and is sued in his official capacity.

10. Defendant, Diane Gordian, is the deputy chief clerk of the Lehigh County Board of Elections and is sued in her official capacity.

Background

11. The Pennsylvania Election Code requires that mailed and absentee ballots must be returned either by mail or in person by the person to whom the ballot belongs.

12. Regarding the return of a mailed ballot, 25 P.S. § 3150.16(a) states “[s]uch envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”

13. Regarding the return of an absentee ballot, 25 P.S. § 3146.6(a) states the same: “Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”

14. Mailed or absentee ballots returned by someone other than the voter are void, invalid, and should not be counted. *In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election*, 577 Pa. 231, 843 A.2d 1223 (2004) (“[the] “in person” delivery requirement is mandatory, and that the absentee ballots of non-disabled persons who had their ballots delivered in contravention of this mandatory provision are void.”); *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5407748, at *9 (W.D. Pa. Sept. 8, 2020) (“everyone now agrees that the election code forbids third-party ballot delivery.”); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 691 (W.D. Pa. 2003) (entering preliminary injunction voiding and barring the counting of 937 absentee ballots delivered by third parties.)

15. The Lehigh County Board of Elections understands this well-settled rule:

“**Important Information for All Absentee/Mail-In Voters: With the exception of absentee voters who have a disability or who are overseas, **all Ballots must be delivered to the County Board of Elections either in person by the voter themselves or through the U.S. Postal Service. Ballots delivered by any other means for absentee/mail-in voters who don't have a disability will not be accepted by the County Board of Elections.** Absentee Ballots delivered for voters who do have a disability may be delivered by a third-party who has written authorization from the disabled absentee. Absentee Ballots delivered for an absentee voter who is overseas on Election Day may be made by an overseas delivery service.”

<https://www.lehighcounty.org/Departments/Voter-Registration/Absentee-Mail-In-Ballot> (last visited August 3, 2022) (emphasis added)

16. The Lehigh County Board of Elections authorizes the use of ballot drop boxes.

17. The Board of Elections has traditionally established five ballot drop box locations for the upcoming general election: (1) Whitehall Township Municipal Building, (2) Lehigh County Authority (LCA) lobby, (3) Fountain Hill Borough Building, (4) Lehigh County Government Center, and (5) Macungie Borough Building. <https://www.lehighcounty.org/Departments/Voter-Registration> (last visited August 3, 2022).

18. While all drop boxes were inside the buildings where they are located, the defendants do not maintain any measures to assure that a voter delivers only his or her own ballot.

19. At least one location, the Lehigh County Government Center, is open 24 hours a day 7 days a week. *Id.*

20. On January 20, 2022, the Lehigh County Republican Committee raised concerns that third parties were depositing (void) ballots in the County's drop boxes in previous elections and that it would likely occur again in upcoming elections.

21. Indeed, the party alleged that there were at least 300 more ballots deposited into the drop boxes than there were individuals that visited the drop boxes.

22. Based on those concerns, the Lehigh County District Attorney investigated whether votes delivered by third-parties were being deposited into drop boxes in Lehigh County. A copy of the Lehigh County District Attorney's report is attached at Exhibit "1".

23. His office reviewed surveillance video of drop boxes from the 2021 general election. *Id.*, 4.

24. His conclusion was that invalid and void votes were deposited into the drop boxes. *Id.*

25. A county detective was able to confirm 186 instances where more than one ballot was dropped by an individual. *Id.*

26. His office also concluded that 3,695 ballots were placed into the drop boxes.

27. But the surveillance video showed only 2,756 persons dropping ballots into the boxes. *Id.*

28. The report concludes "it is also abundantly clear that those provisions of the law [prohibiting ballot harvesting] are being breached by large numbers of voters." *Id.*, 6.

29. The Lehigh County Republican Committee demanded that the Lehigh County Board of Elections establish safeguards to prevent the third-party delivery of mailed ballots to drop boxes.

30. The Board of Elections officials refused.

31. However, the Lehigh County District Attorney announced he would position detectives at the drop boxes and charge any person that violated the Election Code by delivering more than one ballot. Katherine Reinhard, *Lehigh County DA to monitor ballot drop-off boxes for violators*, Pennsylvania Capital Star, April 27, 2022, <https://www.penncapital-star.com/election-2022/lehigh-county-da-to-monitor-ballot-drop-off-boxes-for-violators/>

32. In response to that plan, the Pennsylvania Secretary of State wrote to the District Attorney and expressed concern that the plan might violate the Pennsylvania Election Code and deter voters from delivering a ballot. See letter from Leigh Chapman to the Honorable James B. Martin, May 5, 2022, at Exhibit 2.

33. The Secretary suggested the District Attorney's plans amounted to "voter intimidation," and requested that he "not station law enforcement outside of ballot drop boxes in Lehigh County." *Id.*

34. She concluded by urging the District Attorney to shift his focus to "voter education." *Id.*

35. Additionally, the American Civil Liberties Union sent a letter to the District Attorney. See letter from Marian K. Schneider to James D. Martin, May 5, 2022, at Ex. 3.

36. The ACLU stated that the District Attorney's plan "cross[es] the line into unlawful harassment and intimidation of voters, which is prohibited under both federal and Pennsylvania law." *Id.*

37. The ACLU described the District Attorney's plan as legally flawed and demanded he cease and desist implementation of the plan. *Id.*

38. Despite these demands, the District Attorney implemented his plan and it achieved its goal as there were no reported cases of third-party delivery of ballots.

39. Although both the Secretary and the ACLU hinted at litigation to stop the plan, no litigation ensued

40. However, there is no assurance that the District Attorney will implement a similar plan for the general election.

41. Moreover, because the plan's legality has been questioned litigation may prevent a similar plan from being used for the general election.

42. So, there is no assurance that the County's drop boxes will be utilized in a manner that is permitted under the Election Code.

CAUSES OF ACTION

COUNT I

Injunctive Relief

Violation of the Pennsylvania Election Code

43. Plaintiffs incorporate the previous paragraphs by reference.

44. A special and preliminary injunction is necessary to prevent the Lehigh County Board of Elections from receiving void and invalid ballots that are delivered by third-parties and then commingling those ballots with validly cast ballots.

45. The five elements for the issuance of a preliminary injunction are (1) the injunction is necessary to prevent immediate and irreparable harm, which cannot be compensated by damages; (2) greater injury would result by refusing it than by granting it; (3) an injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; (4) the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and (5) the plaintiff's right to relief is clear. *Kierski v. Twp. of Robinson*, 810 A.2d 196, 198 (Pa.Cmwlth. 2002).

46. Each of these five elements exists here.

47. First, plaintiffs will suffer irreparable harm in that the void or invalid ballots will dilute their validly cast ballots— and the validly cast ballots of other voters— thereby impinging on their fundamental right to vote.

48. As in *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 691 (W.D. Pa. 2003), injunctive relief is necessary to preclude the commingling of ballots delivered by third parties and “if relief is not granted, the hand-delivered ballots would be rendered unidentifiable and any practical opportunity for the ballots to be challenged would be eliminated.”

49. Plaintiffs will also suffer irreparable harm because the Lehigh County Board of Elections will be conducting an election in contravention of the Pennsylvania election code. *Shaeffer v. City of Lancaster*, 754 A.2d 719, 723 (Pa.Cmwlth. 2000) (“Statutory violations are sufficiently injurious to constitute irreparable harm.”)

50. Second, greater injury will result if the injunction is not entered than if it is granted.

51. If the injunction is not entered plaintiffs' fundamental right to vote will be lost because their votes will be cancelled by invalid votes delivered by third-parties.

52. Conversely, there will be no harm to the Lehigh County Board of Elections.

53. Defendants can continue to use drop boxes provided they institute adequate procedures to assure that only the voter delivers an absentee or mailed ballot to the drop box, such as placing the drop boxes inside and open only during normal business hours where the delivery of the ballot can be verified.

54. Third, the injunction will maintain the status quo because it will assure that the drop boxes do not receive invalid ballots.

55. Fourth, the requested injunction is limited to abate the harm.

56. Indeed, the preliminary injunction would not prohibit the use of ballot drop boxes. It only requires defendants to use the drop boxes in a manner that assures that the ballot is delivered to the drop box only by the person to whom it belongs and in a manner otherwise consistent with the Election Code.

57. Fifth, plaintiffs' right to relief is clear. District Attorney Martin's investigation showed that invalid ballots were placed into the drop boxes during the 2021 general election and there is no reason to believe that third parties will not deliver ballots belonging to voters other than themselves in the November 8, 2022 primary and elections thereafter.

COUNT II
Action in Mandamus
Pa. R. Civ. P. 1091

58. Plaintiffs incorporate the previous paragraphs by reference.

59. Defendants have a public duty to count and canvass votes according to the Pennsylvania election code and to carry out those mandatory duties under the election code.

60. Defendants have a public duty to make sure that mailed and absentee ballots delivered by third-parties are not counted or commingled with validly cast ballots.

61. Plaintiffs have an interest in assuring that Defendants only count validly cast ballots and that void ballots are not commingled with valid ballots because invalid and void ballots will cancel out their validly cast ballots.

62. Also, once invalid and void ballots are commingled plaintiffs - and any other interested citizens – can no longer challenge the ballots that were delivered by third-parties.

63. Plaintiffs lack an adequate remedy at law.

Demand for Relief

WHEREFORE, Plaintiffs, Sean Gill, Robert Smith, Tim Ramos, and Jackie Rivera respectfully request that this Court enter judgment in their favor and against Defendants and award the following relief:

1. Enjoining Defendants and anyone acting through, with, or on behalf of them, from using drop boxes to receive absentee or mailed ballots unless they are placed inside a building and accessible only Monday through Friday and during normal business hours, for example from 9:00am to 5:00pm.

2. Enjoining Defendants and anyone acting through, with, or on behalf of them, from using drop boxes to receive absentee or mailed ballots unless they are physically monitored in-person to assure that the person delivering the ballot is only delivering his or her own ballot, unless the person is an authorized designated agent of a disabled voter with the proper affidavit signed by the voter and verified by the election board.

3. Enjoining Defendants and anyone acting through, with, or on behalf of them, from accepting, counting, or canvassing any mailed or absentee ballot that was delivered by a person other than the voter himself or herself, except for ballots delivered by an authorized designated agent of a disabled voter;

4. Compelling Defendants to fulfill their statutory duties to assure that void and invalid ballots are not commingled with valid ballots and not counted in the November 8, 2022, general election and all elections thereafter; and

5. Entering any other appropriate relief.

Respectfully submitted,

Dated: September 1, 2022

/s/ Walter S. Zimolong
Walter S. Zimolong III, Esquire
James J. Fitzpatrick III, Esquire
Zimolong, LLC
Attorney I.D. 89151
wally@zimolonglaw.com
PO Box 552
Villanova, PA 19085-0552
Tele: 215-665-0842

/s/ Nicholas R. Barry
(*pro hac vice pending*)
America First Legal Foundation

Tennessee Bar No. 031963
nicholas.barry@aflegal.org
611 Pennsylvania Ave SE #231
Washington, DC 20003